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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**EASTERN DIVISION**

SEAN SCALES, ) Case No. EDCV 08-1596-SJO (MLG)  
Petitioner, ) MEMORANDUM AND ORDER DISMISSING  
v. ) SUCCESSIVE PETITION FOR WRIT OF  
M.C. KRAMER, ) HABEAS CORPUS  
Respondent. )  
\_\_\_\_\_  
I. Facts and Procedural History

Petitioner is a state prisoner currently incarcerated at the Folsom State Prison in Folsom, California. He filed this petition for writ of habeas corpus on November 7, 2008. Because this is Petitioner's second petition challenging the identical underlying state court conviction, this petition must be dismissed as successive under 28 U.S.C. § 2244(b)(3)(A).

On January 4, 2000, following a jury trial<sup>1</sup> in the San Bernardino County Superior Court, Petitioner was convicted of robbery, in violation of Cal. Penal Code § 211. The jury acquitted

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<sup>1</sup> This was Petitioner's second trial on this charge. The first trial had ended in a hung jury.

1 Petitioner of the lesser included offense of petty theft with a prior  
2 conviction. The trial court found true the allegation that Petitioner  
3 had two prior "strike" convictions for robbery under Cal. Penal Code  
4 §§ 667(b)-(i), 1170.12. On August 25, 2000, Petitioner was sentenced  
5 to a term of 25 years to life in prison.

6 On September 5, 2001, the California Court of Appeal affirmed  
7 the judgment in an unpublished decision. *People v. Scales*, Case No.  
8 E027938. On November 14, 2001, the California Supreme Court denied  
9 a petition for review. *People v. Scales*, Case No. S101349.

10 Between September 2002 and July 2003, Scales filed a series of  
11 petitions for writ of habeas corpus in the California courts, all of  
12 which were denied.

13 On November 7, 2003, Petitioner filed a petition for writ of  
14 habeas corpus in this Court challenging the judgment of conviction.  
15 *Scales v. Adams*, Case No. EDCV 03-1292-SJO (MLG). On May 31, 2006,  
16 an order and judgment was entered denying the petition with  
17 prejudice. This Court denied a certificate of appealability July 6,  
18 2006. On December 21, 2006, the United States Court of Appeals for  
19 the Ninth Circuit also denied a certificate of appealability.<sup>2</sup>

20 The current petition challenges the constitutionality of the  
21 sentence Petitioner received in 2000. While the ten claims for relief  
22 presented are difficult to comprehend, it appears that Petitioner is  
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24 <sup>2</sup> In 2006, petitioner filed a series of state habeas corpus  
25 petitions challenging a 1995 robbery conviction, which was the  
26 predicate for one of the prior "strike" convictions supporting the  
27 three strikes sentence in this case. On July 27, 2007, Petitioner filed  
28 a petition for writ of habeas corpus in this Court challenging that  
1995 conviction. *Scales v. Kramer*, Case No. EDCV 07-0930-SJO (MLG).  
That petition was dismissed as untimely filed on October 19, 2007.  
Certificates of appealability were denied by both this Court and the  
Ninth Circuit.

1 essentially challenging the sentence imposed by the trial court based  
2 upon the decision of the United States Supreme Court in *Cunningham*  
3 v. *California*, 127 S. Ct. 856 (2007). For the reasons set forth  
4 below, the petition is ordered dismissed without prejudice to  
5 Petitioner's right to apply to the Ninth Circuit Court of Appeals for  
6 leave to file a successive petition.

7

8 **II. Discussion**

9 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in  
10 the United States District Court, a district court may summarily  
11 dismiss a habeas petition, before the respondent files an answer,  
12 "[i]f it plainly appears from the face of the petition ... that the  
13 petitioner is not entitled to relief." The notes to Rule 4 state:  
14 "[A] dismissal may be called for on procedural grounds, which may  
15 avoid burdening the respondent with the necessity of filing an answer  
16 on the substantive merits of the petition." See *Boyd v. Thompson*, 147  
17 F.3d 1124, 1127-28 (9th Cir. 1998). Because this Court lacks  
18 jurisdiction to review this petition without authorization from the  
19 court of appeals, as discussed below, summary dismissal of this  
20 petition is warranted.

21 The present petition is governed by the provisions of the  
22 Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-  
23 132, 110 Stat. 1214) ("AEDPA"), enacted on April 24, 1996. Among  
24 other things, AEDPA amended 28 U.S.C. § 2244 to require that  
25 "[b]efore a second or successive application [for writ of habeas  
26 corpus] permitted by this section is filed in the district court, the  
27 applicant shall move in the appropriate court of appeals for an order  
28 authorizing the district court to consider the application." 28

1 U.S.C. § 2244(b)(3)(A). Section 2244(b)(3)(A) explicitly provides  
2 that a *second and/or successive* petition, like the one in this case,  
3 requires Ninth Circuit approval before it can be considered by the  
4 district court. *Burton v. Stewart*, 549 U.S. 147, 127 S. Ct. 793, 796  
5 (2007). This Court must dismiss any second or successive petition  
6 unless the court of appeals has given Petitioner leave to file the  
7 petition because a district court lacks subject-matter jurisdiction  
8 over a second or successive petition. *Pratt v. United States*, 129  
9 F.3d 54, 57 (1st Cir. 1997); *Greenawalt v. Stewart*, 105 F.3d 1268,  
10 1277 (9th Cir. 1997); *Nunez v. United States*, 96 F.3d 990, 991 (7th  
11 Cir. 1996).

12 A claim in a second or successive habeas petition that was not  
13 previously presented may be considered if the petitioner shows that  
14 the claim relies upon a new rule of constitutional law, made  
15 retroactive to cases on collateral review by the Supreme Court, that  
16 was previously unavailable. 28 U.S.C. § 2244(b)(2)(A). However, a  
17 petitioner is still required to seek authorization from the court of  
18 appeals in order to have the district court consider the petition.  
19 28 U.S.C. § 2244(b)(3)(A), see also *Reyes v. Te Vaughn*, 276 F. Supp.  
20 2d 1027, 1030 (C.D. Cal. 2003) ("[T]o the extent that petitioner  
21 would like to show that he falls within one of the exceptions to  
22 dismissal of successive habeas petitions, 28 U.S.C. § 2244(b)(2)(B),  
23 he must first present any such claim to the Court of Appeals rather  
24 than to this Court.").<sup>3</sup>

25 This petition was filed without leave of the Ninth Circuit.  
26 Until the Ninth Circuit authorizes the filing of this petition, this  
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28 <sup>3</sup> Moreover, Petitioner has not shown that the Supreme Court has held *Cunningham* to be retroactive on collateral review.

1 Court lacks jurisdiction to consider the merits. See *Burton*, 127 S.  
2 Ct. at 799; *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001);  
3 *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996) (district  
4 court lacks subject matter jurisdiction to consider second or  
5 successive petition). Thus, dismissal of the petition without  
6 prejudice is required.

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8 **III. Order**

9 In accordance with the foregoing, IT IS HEREBY ORDERED that the  
10 petition is DISMISSED without prejudice to petitioner's applying to  
11 the United States Court of Appeals for the Ninth Circuit for leave  
12 to file a second or successive petition.

13 IT IS FURTHER ORDERED that the clerk shall serve a copy of this  
14 order on Petitioner and the Attorney General for the State of  
15 California.

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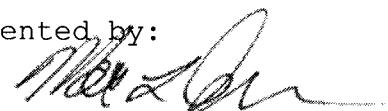
17 11/20/08

/S/ S. James Otero

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18 S. James Otero  
19 United States District Judge

20 Presented by:



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22 Marc L. Goldman  
23 United States Magistrate Judge

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**NOTICE PARTY SERVICE LIST**Case No. EDCV08-1596-SJO (MLG) Case Title Sean Scales v. M.C. KramerTitle of Document Memorandum and Order Dismissing Successive Petition

Atty Sttlmnt Officer Panel Coordinator
BAP (Bankruptcy Appellate Panel)
Beck, Michael J (Clerk, MDL Panel)
BOP (Bureau of Prisons)
CA St Pub Defender (Calif. State PD)
CAAG (California Attorney General's Office - Keith H. Borjon, L.A. Death Penalty Coordinator)
Case Asgmt Admin (Case Assignment Administrator)
Catterson, Cathy (9 <sup>th</sup> Circuit Court of Appeal)
Chief Deputy Admin
Chief Deputy Ops
Clerk of Court
Death Penalty H/C (Law Clerks)
Dep In Chg E Div
Dep In Chg So Div
Federal Public Defender
Fiscal Section
Intake Section, Criminal LA
Intake Section, Criminal SA
Intake Supervisor, Civil
PIA Clerk - Los Angeles (PIALA)
PIA Clerk - Riverside (PIAED)
PIA Clerk - Santa Ana (PIASA)
PSA - Los Angeles (PSALA)
PSA - Riverside (PSAED)
PSA - Santa Ana (PSASA)
Schnack, Randall (CJA Supervising Attorney)
Statistics Clerk

US Attorneys Office - Civil Division -L.A.
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US Attorneys Office - Criminal Division -S.A.
US Bankruptcy Court
US Marshal Service - Los Angeles (USMLA)
US Marshal Service - Riverside (USMED)
US Marshal Service -Santa Ana (USMSA)
US Probation Office (USPO)
US Trustee's Office
Warden, San Quentin State Prison, CA

<input checked="" type="checkbox"/>	<b>ADD NEW NOTICE PARTY</b> (if sending by fax, mailing address must also be provided)
Name: Office of the Attorney General	
Firm: CA State Dept of Justice	
Address (include suite or floor): 300 S. Spring Street	
Suite 500, Los Angeles CA 90013	
*E-mail:	
*Fax No.:	

<b>JUDGE / MAGISTRATE JUDGE (list below):</b>

Initials of Deputy Clerk ts 